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The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
Fire Safety Commission

Automatic Sprinkler Appeals Board

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VICE CHAIR

Docket # 2006-137
77R Rocky Neck Ave
Gloucester, MA

AUTOMATIC SPRINKLER APPEALS BOARD DECISION

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination of the Gloucester Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by Nicole Ahearn, agent of Rocky Neck, Inc., d/b/a Madfish Grille (hereinafter referred to as the Appellant). The building, which is the subject of the Order, is located at 77R Rocky Neck Ave, Gloucester, MA.

B) Procedural History

By written notice dated February 9, 2006, the Gloucester Fire Department issued an Order of Notice to the Appellant informing it of the provisions of M.G.L c. 148, s. 26G½, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures. The building subject to the order is located at 77R Rocky Neck Ave, Gloucester, MA. The Appellant filed an appeal of said order on May 13, 2006 but the appeal was initially rejected by the Board for being untimely. The Appellant filed a motion for the Board to reconsider the initial denial. A hearing on the motion was held on September 11, 2007 and continued until January 8, 2008. By written decision, dated January 30, 2008, the Board ruled that the appellant could proceed with the appeal. After several continuances at the request of the parties, the Board held a hearing on the merits of the appeal on August 13, 2008, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was Attorney Edward Pasquina. Representing the Gloucester Fire Department was Deputy Chief Stephen Aiello. The Appellant's counsel confirmed that he was representing the Appellant as owner of both the business and the building.

Present for the Board were: Thomas Coulombe, Acting Chairman; Roderick Fraser; Alexander Macleod; Peter Gibbons; John J. Mahan; and Aime R. DeNault. Peter A. Senopoulos, Esquire, was

the Attorney for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Gloucester Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal filed by Appellant
2. Statement in Support of Appeal
3. Order of Notice of the Gloucester Fire Department
4. Correspondence from Stephen W. Livermore of H.H. Morant & Co., Inc.
5. 1st Notice of Hearing to Parties.
6. 2nd Notice of Hearing to Parties.
7. Correspondence/3rd Notice of Hearing to Parties
8. 4th Notice of Hearing to Appellant
9. 4th Notice of Hearing to Gloucester Fire Department
10. Copies of two Memoranda that accompany hearing notices
11. Joint Exhibit (Appellant/FD) Items A-M
12. Appellant's Pictures (A-C)
13. E-mail to Deputy Chief Steve Aiello dated May 7, 2008

E) Subsidiary Findings of Fact

- 1) By written notice dated February 9, 2006, the Gloucester Fire Department issued an Order of Notice to the Appellant informing it of the provisions of M.G.L. c. 148, s. 26G½, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures, or portions thereof, used or designed as a nightclub, dance hall, discotheque or a bar with a capacity of 100 persons or more. The building subject to the order is located at 77R Rocky Neck Ave, Gloucester, MA and houses an establishment which operates under the name of "The Madfish Grille", a private, for profit business.
- 2) Preliminary hearings were held to determine the adequacy of the original Order of Notice and the timing of the filing of the appeal. After several continuances at the request of the parties, the Board held a hearing on the merits of the appeal on August 13, 2008.
- 3) Photographs and floor plans submitted by the parties depict a single level establishment featuring an informal waterfront setting in Gloucester, Massachusetts. The establishment, made of wood construction, consists of four general areas. There is an area described as a dining area with tables and chairs, which is connected by a set of glass doors to a substantial bar/lounge, described as the deck area. This area features a long bar with approximately 18 bar stools and approximately 25 two seat tables.
- 4) This lounge is also connected to an area that features an enclosed dance floor, which leads

out, through another set of glass doors to an outdoor area described as a patio, covered by a vinyl tent-like material. The patio features tables, chairs and a separate bar.

- 5) According to the current Certificate of Inspection, issued on July 9, 2008, the City of Gloucester established the facility's occupant load, which is broken down as follows: 99 persons for the "bar/lounge/deck" area, 108 persons for the dining room and 49 persons for the patio area. The total occupant load for this facility is 256 persons. The Certificate of Inspection also classifies the establishment as an "A-3" use group. A previous Certificate of Inspection issued on May 7, 2008, listed the lounge/deck area as having an occupant load of 108 persons.
- 6) According to testimony of Appellant's counsel, the establishment is a seasonal restaurant that operates from approximately early May until mid September, depending upon the weather. In addition, he indicated that the facility also occasionally features special events in the off-season, such as a Halloween party.
- 7) Appellant's attorney testified that the facility has a full liquor license that allows for the service of all kinds alcoholic beverages from 8:00 a.m. to 1:00 a.m. and indicated that the facility generally operates between the hours of 11:00 a.m. and 1:00 a.m. The kitchen usually stops serving meals at around 10:00 p.m. The representative for the Appellant did not provide any details regarding the ratio of food vs. liquor sales.
- 8) The establishment has been issued an entertainment license, which legally allows the appearance of live musical entertainment. According to Appellant's representative, a wide variety of live entertainment is featured on a routine, yet seasonal basis, on Saturdays and Sundays until 1:00 a.m. and also on many Thursday and Friday evenings. Web advertisements and music reviews submitted at the hearing indicate that there is a wide variety of performances including: Rock, Blues and Jazz bands. As indicated in the advertisements, and confirmed at the hearing, a separate "cover charge" is usually collected at the door when entertainment is featured. Persons who pay the cover charge are allowed to sit in the dining room to eat a meal, then enjoy the entertainment. The bands set up on the dance floor, which is also used by patrons for dancing. According to Appellant's testimony there are no fixed special effects lighting featured. However, Deputy Chief Aiello indicated that it has been his observation that some of the entertainers set up their own special effects lighting.
- 9) Appellant's attorney indicated that the various areas of the establishment are divided by a physical separation in the form of walls and doorways, and that these portions have separate means of egress. He also noted that two of the areas have a capacity of under 100 persons and that the dining area, which has a capacity 108, is used mainly as a restaurant and therefore specifically exempt from the s. 26G½ sprinkler requirements.
- 10) Deputy Chief Aiello indicated that the Order to install sprinklers was based upon the overall building capacity of over 100 persons, the existence of two substantial bar and/or lounge areas with full liquor sales, evidence of concentrated occupancy load, an entertainment license and the routine appearance of live musical entertainment for viewing and dancing purposes. He further indicated that the establishment, although serving significant meals on a regular basis, routinely transforms into a "bar-like " or nightclub type atmosphere after dinnertime when the kitchen closes.

- 11) There was general agreement, in the form of testimony, indicating that the facility's occupant load is of a concentrated nature, particularly in the lounge/ bar, dancing floor and patio areas. Deputy Chief Aiello indicated that he is concerned about this concentrated occupancy, especially on warm summer nights when entertainment is performing. Appellant's Counsel indicated that it is his understanding that the occupant load is tightly controlled by staff, who keep a careful capacity count and check the identification of patrons. In contrast, Deputy Aiello testified that during his visits to the facility, he has never seen any employee with a "counter." He indicated that he has asked staff about capacity numbers and stated that staff was unaware of the actual occupant count at a given time. He also testified that during such visits while entertainment was present, which consisted of at least 12 occasions, he personally witnessed a constant free flow of patrons from one portion of the facility to the other, particularly between the patio, deck, lounge and dance floor areas. Appellant's Counsel indicated that it is his understanding that it is the facility's policy to not allow such free flow, but he has no personal knowledge of what actually occurs.
- 12) Deputy Aiello voiced further fire safety concerns regarding the structure based upon its Type 5 lightweight wood construction. He emphasized the fact that the facility is surrounded on three sides by the Atlantic Ocean and that several of the exits lead either directly to another building or other portions of the subject building, therefore hampering firefighting efforts and customer exit. He stated that the Gloucester Fire Department, in the case of a fire, does not have a fireboat or other means of access via water. He also noted that the bar remains open almost 2½ hours past the close of the kitchen.
- 13) Appellant, through Counsel did not present any arguments based upon technical issues relative to the type or extent of sprinkler installation, including any modified, partial or alternative system.
- 14) Deputy Aiello indicated that this establishment has some features of a restaurant, but that it also features significant activities consistent with a nightclub, "A-2" like occupancy and a bar.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G½, in pertinent part states: " every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, or similar entertainment purposes...(a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code". The law was effective as of November 15, 2004.
- 2) The statutory timeline for said sprinkler installation in accordance with the provisions of section 11, St. 2004, c.304, requires the submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and complete installation within 3 years of the effective date of the act (by November 15, 2007).
- 3) In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law, c.148, s. 26G½. This law was a portion of a comprehensive legislative initiative (The Fire Safety Act of 2004) undertaken as the result of a tragic Rhode Island

nightclub fire, which took place in February 2003. . In said memorandum, this Board acknowledged that the statute did not contain a definition of the words “nightclub, dance hall, discotheque, bar or similar entertainment purposes.” However, the board noted that the terms “nightclub” and “dance hall” are used within the A-2 use group classification found in the 6th Edition of the Massachusetts Building Code, 780 CMR 303.3. This use group definition was drafted from nationally recognized model building code language. The commentary documents relating to the A-2 use group definitions used in the nationally recognized model code, indicates that such classification includes occupancies in which people congregate in high densities for social entertainment purposes. Examples given in the commentary are: dancehalls, nightclubs, cabarets, beer gardens, drinking establishments, discotheques and other similar facilities. The commentary concluded that the uniqueness of these occupancies is characterized by, but not limited to the following factors:

- a) No theatrical stage accessories other than raised platform;
- b) Low lighting levels;
- c) Entertainment by a live band or recorded music generating above-normal sound levels;
- d) Later-than-average operating hours;
- e) Tables and seating arranged or positioned so as to create ill defined aisles;
- f) A specific area designated for dancing;
- g) Service facilities primarily for alcoholic beverages with limited food service; and
- h) High occupant load density.

It was the interpretation of this board that such characteristics are typical of the “A-2 like” occupancy (which was a general reference to the A-2 use group referenced in 780 CMR, the State Building Code) and that these are the type of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s. 26G½. It was noted that the list of characteristics were not necessarily all-inclusive. The factors may be applied individually or in combination, depending upon the unique characteristics of the building, at the discretion of the head of the fire department. Additionally, the Board notes that notwithstanding the “A-2 like” characteristics typical of a nightclub, dancehall or discotheque, the statute also clearly applies to “every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a...**bar**...”.

- 4) Based upon the evidence presented at the hearing, this facility is clearly presented as an assembly use occupancy with a total occupant capacity of 256 persons. The legal classification of this establishment as an “A-3” assembly occupancy by the City of Gloucester is a significant factor. Under the provisions of the State Building Code, 780 CMR, such a classification includes establishments that are typically designed and used as a restaurant (see 780 CMR 303). A building, or a portion thereof, used or designed “principally as a restaurant” is specifically exempt

from the enhanced sprinkler requirements of c. 148, s. 26G½. However, this classification alone is but one factor of many that this Board will look at in making a determination. Although this facility may have some features of a restaurant, it also includes significant characteristics of both a bar and a nightclub, as those terms are used in MGL c. 148, s. 26G½. In its 1-10-05 memorandum, the Board acknowledged the existence of establishments that may feature characteristics of both a restaurant and a bar or nightclub. In determining whether or not such “combination” establishments are subject to the provisions of M.G.L. c. 26G½, this Board will look at such common sense factors such as:

- a) Does the restaurant establishment regularly and routinely serve meals on a daily basis?
 - b) Does the establishment provide a bar, bar seating, bar standing and a bartender for the purposes of serving alcoholic beverages directly to alcohol consuming customers?
 - c) Does the bar and bar seating area have the ability to expand into the dining area to accommodate special entertainment activities or increased capacity/density.
 - d) If the establishment provides a bar and bar seating, are alcoholic beverages continuously served to customers more than one hour after full kitchen facilities have been closed?
 - e) Is live or recorded music provided for dancing purposes or for a viewing audience? (does not include background dinner music)?
 - f) Does the establishment provide special entertainment, including but not limited to: musical, theatrical, comedy, or sport viewing activities?
 - g) Based upon the establishment’s name, décor, atmosphere, does a customer expect a bar or nightclub type establishment?
 - h) Is the establishment or portions thereof routinely or regularly used for private or public functions for dancing, parties, celebrations, entertainment or performance purposes?
 - i) Does the establishment have an entertainment license?
- 5) In applying these factors to this building, the Board finds that the establishment does routinely serve meals on a daily basis. However, in looking at the characteristics of the establishment as a whole, it also features significant characteristics typical of both a bar and a nightclub.
- 6) The establishment possesses a full liquor license and provides two separate bars, one located in the bar/lounge portion and another located on the covered patio area. These bars are used for the purposes of serving alcoholic beverages directly to customers, regardless of whether the customer is eating a meal or not. Both bars serve customers who are often in the establishment for the purposes of viewing or dancing to live or recorded musical entertainment.
- 7) The establishment continuously provides bar seating and alcoholic beverages to customers more than 2½ hours after full kitchen facilities have been closed. According to testimony, the kitchen

closes down at 10:00 p.m. The liquor license indicates that the establishment may serve alcoholic beverages until 1:00 a.m. The establishment routinely remains open until at least 12:30 a.m.

- 8) The facility has been issued an entertainment license and provides musical entertainment, in the form of live bands, on a routine and regular basis for the purposes of entertaining patrons. The facility contains a dance floor for patron dancing. During the warm weather months, such entertainment appears on most Saturday and Sunday evenings and also on many Thursday and Friday nights.
- 9) Based upon the establishment's décor and presentation to the general public, a customer can reasonably expect "bar" or "nightclub"-like accommodations. Such factors include, in addition to the regular appearance of live bands: a dance floor, waterfront location, large seasonal outdoor tent covered patio area, and variety of seating arrangements, including bar stools and wooden tables which all create an environment that is typical of many water front bars or nightclubs. The establishment is widely featured on many web sites as an attractive place for those who seek musical entertainment, dancing and the consumption of alcoholic beverages in a bar or nightclub setting.
- 10) The Deputy Fire Chief testified that he has visited the establishment on at least a dozen occasions and has witnessed concentrated occupancy situations. He personally witnessed a constant free flow of patrons from one portion of the facility to the other, particularly between the patio, deck, lounge and dance floor areas. Appellant's counsel indicated that it is his understanding, but not his personal knowledge, that the occupant load is tightly controlled by staff, who keep a careful capacity count and check the identification of patrons. The Board finds it very unusual that a facility claiming to be "principally a restaurant" would post personnel at entrances for the purpose of keeping head counts and checking the identification of patrons upon entry. Such protocols are usually only employed in a nightclub or bar environment.
- 11) The representative of the Appellant indicated that this board, in prior decisions, has determined that sprinklers were not required pursuant to s. 26G½ in certain establishments that also featured combined characteristics of a restaurant, bar or entertainment venue. However, in such limited cases, the Board determined that the facility featured a well-defined physical and operational separation between those portions of the establishment used principally as a restaurant from those portions used as a bar or for entertainment. The Appellant, through counsel, failed to provide adequate evidence to support such a determination by this board to treat the various portions of this establishment in such a separate manner. To the contrary, there was clear and substantial evidence to support a determination that both the activities and patron movement are of a free flowing nature.

G) Decision

For the foregoing reasons, this Board **unanimously upholds** the Order of the Gloucester Fire Department to install an adequate system of sprinkler protection throughout the subject building and patio structure in accordance with the provisions of M.G.L. c.148, s. 26G½.

Plans for such installation shall be submitted to the fire department within 90 days from date of this decision. Installation of said system shall be completed within 6 months from date of said decision.

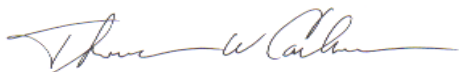
H) Vote of the Board

Thomas Coulombe, Acting Chairman	In Favor
Roderick Fraser, Commissioner	In Favor
Alexander MacLeod	In Favor
Peter Gibbons	In Favor
John J. Mahan	In Favor
Aime DeNault	In Favor

I) Right of Appeal

You are hereby advised you have the right to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order, pursuant to section 14 of chapter 30A of the General Laws.

SO ORDERED,



Thomas Coulombe, Acting Chairman

Dated: October 20, 2008

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO:

Edward F. Pasquina, Esq.
75 Middle Street
Gloucester, Massachusetts 01930

Deputy Chief Stephen Aiello, Jr.
Gloucester Fire Department
8 School Street
Gloucester, Massachusetts 01930